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Reconciling Religion with Constitutional Democracy: Israel, Egypt & Tunisia

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INTRODUCTION

In 2010, an act of self-immolation by a small-town Tunisian vegetable vendor ignited an unprecedented revolutionary wave in the Middle East. Dubbed as the Arab Spring, revolutionaries in the Middle East have toppled legacies of autocratic rulers and expelled their oppressive regimes. As the Arab nations continue to transition away from autocracy, the possibility of attaining a viable democratic form of government hinges on the words of the states’ constitutions. It is difficult to conjecture however, exactly how a democratic conversion will essentially look in the Middle East, when both religious and legal laws are given considerable weight in personal and political decision-making. Understanding that Islam “has its own system of law with certain unique characteristics, such as the sacredness of certain legal principles and divine origin of its traditional legal system,” the question becomes “whether the rule of law can be divorced from Western liberal democracy or whether a different understanding of the rule of law could be conceptualized” in the Middle East.1

In fact, this paper postulates that it is conceivable for the Arab nations to tailor certain interpretations of Islamic laws in a way that could comport with the basic goals of a Western liberal democracy while continuing to adhere to religious law and practices. Foremost, this paper compares two Western liberal democracies in order to ascertain which fundamental aspects

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1 J.D. Candidate, May 2014, Seton Hall University School of Law; B.A., 2010, Rutgers University. Thank you to Professor Bernard F. Freamon for his continuous support and assistance.

are vital to any democracy and to also demonstrate that democratic variations are acceptable. Even though there are many democratic governments that exist today, the paper focuses on the United States and post-World War II European nation-states because they provide for the bulk of financial and security needs of the particular Arab nations under discussion.² It is necessary then to provide a brief overview explaining why only Israel, Egypt and Tunisia will be discussed. In essence, the three countries share many similarities amongst one another. For instance, these countries do not currently have an officially ratified constitutional document due to continuous internal political and religious struggles. Additionally, even though these particular countries have been deemed to the most progressive states of the Middle East, they are guilty of oppressing their citizens’ voice and participation in government. Finally, these countries lack strong, independent branches of government to ensure justice and equality.

Therefore, this paper suggest for Egypt and Tunisia to draft their constitutions with an aim to ensure a clear separation of powers, an impartial court system, and equal treatment for all citizens before both statutory and religious laws. It is argued that a strong and transparent system of government would assist eradicating any existent and/or future corruption. As a result, this would secure citizens’ trust which in effect would benefit the economy and increase the standard of living through the means of self-determination and freedom to pursue economic opportunities. Meanwhile, this paper proposes for Israel to draft an official constitution so as to legitimize its judiciary precedents, ensure enforcement and compliance with democratic principles and international human rights standards. To conclude, this research suggests that regardless of the great emphasis Egypt, Tunisia, and Israel place on Islamic or Jewish laws and

traditions, it is conceivable to have a democracy in those locales as long as there are strong political institutions that ensure equal participation in government and the economy. In other words, reconciliation of the principles of liberal democracy with religious laws – a predominant aspect of Middle Eastern countries – is plausible because a democratic state need not be wholly secular to thrive. Finally, because there is a division among those that fear a religiously-oriented constitution would stifle a successful democratic transition, and those that believe a secular constitution would hurt the interests of religious groups and leaders, I argue that in a democracy, a strong economy could be a compromise between secularists and religious followers.

At a glance, Part I and Part II define democracy, the rule of law and the concept of federalism as applied to the United States and the European Union. These sections will discuss and evaluate the specific factors necessary to achieve a liberal democracy. Part III contains Middle Eastern country analysis for Israel, Egypt and Tunisia. Each country will begin with an introduction highlighting its current or recent socio-political struggles, followed by a historical overview and analysis of the judiciary, legislature, economic and religious implications.

I. DEMOCRACY AND RULE OF LAW

A. Democracy Defined

Without engaging in a lengthy discussion on democratic theory, I will illustrate why a democratic form of government is most desirable by referring to the work of Robert A. Dahl, a prominent twentieth-century political scientist. According to Dahl, democracy is “a vision of a political system in which the members regard one another as political equals, are collectively sovereign, and possess all the capacities, resources, and institutions they need in order to govern
Dahl reasoned that a democratic system of government is advantageous because it avoids tyranny, protects personal interests, and produces political equality, self-determination, moral autonomy, human development, essential rights, general freedom, prosperity, and peace. In order for a government to be considered democratic, Dahl deduced five broad standards that any democracy ought to satisfy: effective participation, equality in voting, enlightened understanding about relevant alternative policies, control of the agenda, and inclusion of adults. Dahl's five democratic requisites ensure that all citizens are treated as political equals since "people are entitled to participate as political equals when making binding decisions, enforced by the state on matters that have important consequences for their individual and collective interests." Therefore, any "[m]easures that selectively hinder the ability of individuals to participate in the political process [is] a violation of the fundamental precept of equal citizenship" because the ability for all citizens to participate in public discourse is fundamental to democracy and political legitimacy of the state.

Dahl further argues that a democratic state ought to embrace certain political institutions,
arrangements or practices that ensure freedom expression, association, and election of
government representatives.\(^8\) Notably, however, a polyarchic democracy is not the only
democracy.\(^9\) Democracy has many variations. Therefore, varying democratic states can satisfy
the aforementioned requisite democratic standards, according to the type of institutional
arrangements they choose.\(^10\)

Democratic states are free to choose varying political institutions, arrangements or
practices as long as they adhere to the basic democratic principles. One way to ensure
democratic loyalty is to create a constitution which describes the state’s political arrangements
and practices.\(^11\) By definition, a constitution is “[t]he fundamental and organic law of a nation or
state that establishes the institutions and apparatus of government, defines the scope of
governmental sovereign powers, and guarantees individual civil rights and civil liberties.”\(^12\)

Accordingly, it should be expected that different democratic states will have varying
constitutional arrangements.\(^13\) However, a democratic constitution must conform with one basic
principle: “that all members are to be treated (under the constitution) as if they were equally
qualified to participate in the process of making decisions about the policies the association will
pursue.”\(^14\) If people are denied participation in the decision making process of government, their

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\(^8\) ON DEMOCRACY, at 84-85. Along with the criteria mentioned, Dahl noted three additional requirements that a
large-scale democratic state ought to have: access to alternative sources of information, inclusive citizenship, and
free, fair and frequent elections. Dahl emphasized that modern, large-scale democratic governments, which was
introduced by the United States between the nineteenth and twentieth century, are considered representative
governments (polyarchal democracies) because all adults are able to engage in political life by expressing their voice
through various political groups/factions. This practice is distinct from earlier forms of democracies in pre-
nineteenth-century Britain for example, or other democracies and republics where political parties, or freedom to
form political organizations to either influence or oppose existing government, were lacking. Id. 86-90.

\(^9\) Id. at 86-90.

\(^10\) Id. at 100.

\(^11\) Id. at 119.

\(^12\) BLACK’S LAW DICTIONARY (9th ed. 2009) (Government is defined as the “structure of principles and rules
determining how a state or organization is regulated” Black’s Law Dictionary (9th ed. 2009), “government”.

\(^13\) ON DEMOCRACY, supra note 7, at 36.

\(^14\) Id. at 37.
fundamental interests will not be adequately protected. As Robert A. Dahl wrote, the "key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political equals". Thus, political equality allows citizens to participate in government decisions, which is essential to ensure a democracy since the larger the state or organization, "the more they must delegate authority to others", and the more difficult it becomes for individuals to directly participate in government decisions.

Constitutions therefore, play an important role in how successful representatives in government carry out the best interests of their constituents. Constitutions can make a difference in ensuring stability for the basic democratic political institutions, protecting fundamental rights, maintain neutrality in the making of laws, ensure political leaders are held accountable for their actions, ensure fair representation, effective government that understands and accommodates citizen's concerns, ensure transparency and provide legitimacy. Constitutions are important because "they shape the concrete political institutions of democratic countries: executives, legislatures, courts, party systems, [and] local governments" which in turn "have important consequences for the fairness of the representation in the legislature, or the effectiveness of the government, and as a result they might even affect the legitimacy of the government."

According to R. Daniel Kelemen, a Rutgers University professor and a political scientist, federalism is an institutional arrangement that embodies three elements: "(a) public authority is divided between state governments and a central government; (b) each level of government has

\[15\] Id. at 76-77.
\[16\] David R. Cameron, Politics, Public Policy, and Distributional Inequality: A Comparative Analysis, in POWER, INEQUALITY, AND DEMOCRATIC POLITICS: ESSAYS IN HONOR OF ROBERT A. DAHL 219, 219 (Ian Shapiro & Grant Reeher eds., 1988).
\[17\] ON DEMOCRACY, at 109.
\[18\] Id. at 124-26.
\[19\] Id. at 129.
some issues on which it makes final decisions; and (c) federal high court adjudicates disputes concerning federalism.\textsuperscript{20} The United States serves as an example of such an institutional arrangement. At the horizontal level, the central, or federal government contains the legislative, executive and the judicial branches, which although separate, work harmoniously to serve as checks and balances on each other in accordance with the U.S. Constitution.\textsuperscript{21} The U.S. Constitution also ensures that the states are protected from unlimited national power under the Tenth Amendment.\textsuperscript{22} In The Federalist, No. 51, James Madison expressed how a vertical separation of powers between the nation and the states, along with a horizontal separation among the federal branches, gives double security to the rights of the people.\textsuperscript{23}

1. Democracy and the Rule of Law

When evaluating post-World War II Europe, it is important to first address the concept of the ‘rule of law’ as advanced by the United Nations and international law theories.\textsuperscript{24} Essentially, the concept of the rule of law represents “the supremacy of law over individuals and the State.”\textsuperscript{25}

Despite disagreements as to its exact definition, the rule of law can be summarized from “thin” and “thick” classifications and formal and substantial theories.\textsuperscript{26} Thin and thick


\textsuperscript{22} Kathleen M. Sullivan & Gerald Gunther, CONSTITUTIONAL LAW 61 (17th ed. 2010).

\textsuperscript{23} Id.

\textsuperscript{24} See supra note 1, at 330.

\textsuperscript{25} Id. at 334-38. "Another way of describing the rule of law is to define it as 'a system of law' or a 'law and order' vessel. In this sense the government may act outside the boundary of the law. For example, scholars have observed that in China the rule of law traditionally refers to an instrumental conception of law where the State uses the "law" at its discretion to establish order in the society. Similarly, in Islamic legal systems, in the absence of an independent judiciary, the State is not subject to the same restraints as individuals."

\textsuperscript{26} Id. at 335-36. Definitions of the Rule of Law stretch from thoughts of Plato and Aristotle to modern theories of natural law and positivism. Id. at 335. Interpretations of the rule of law include ideas on law and reason, supremacy of law, civil disobedience in light of unjust laws, arbitrary laws or political actors' misuse of power. Id. at 335.
classifications embody ideas regarding the limit of power of state and its authorities in light of certain specific democratic, cultural, and economic elements. 27 Meanwhile, formal and substantial theories describe sources of law, formal legality and human rights. 28

As with democracy, a legal system based on the rule of law must embrace several prerequisite factors:

"(i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with, that (iii) its rules are promulgated, (iv) clear and (v) coherent with one another, that (vi) its rules are sufficiently stable to allow people to be guided by their knowledge of the contents of the rules, that (vii) the making of decrees and orders applicable to relatively limited situations is guided by the rules that are promulgated, clear, stable and relatively general; and that (viii) those people who have authority to make, administer, and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance and (b) do actually administer the law consistently and in accordance with its tenor." 29

Compare democracy with the prerequisites of the rule of law doctrine as set out by the United Nations, which defines the rule of law as follows:

"A concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency." 30

Ostensibly, the concept of the rule of law is two-fold – there is an obligation to follow

27 Id. at 335. “More specifically, thin classifications generally involve, at the very least, a limit on the power of the state and state actors, and usually contain a number of elements, such as public accessibility to law, equality before the law, commonality between the law in theory and law in practice, and acceptance of legal principles by a majority of people. Thick classifications include the basic elements included in thin versions and add certain elements, which are usually based on particular cultural, political, and economic systems. An example of a thick conception of the rule of law is a liberal democratic version of the rule of law as applied in Europe, America and Australia. This version includes certain culturally, politically, or economically specific elements, such as free market capitalism and the privileging of civil, political, and individual rights over economic, social, and cultural rights.”

28 Id. at 335-336.

29 Id. at 336 (quoting JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980)).

rules by the citizens of the State as well as the State itself. 31

Lastly, although the rule of law doctrine is associated with Western liberal democracies, the differences amongst Western democracies and amongst Western democracies and other similar political societies contribute to various applications. 32 The differences are attributed to the cultural, social and political arrangements of various democratic nations. Notably, critics who question the value of Western liberal democracy and capitalism, seem to “rarely contest the importance and necessity of the rule of law.” 33

II. DEMOCRACY IN THE UNITED STATES AND IN POST-WORLD WAR II EUROPE

A. The View from the United States

It has been argued that the general “good quality of life” in America is a result of the United States Constitution and its commitment to the “separation of powers and, in particular, on an independent judicial branch.” 34 In fact, the decision to establish the United States Constitution in 1789, emanated from a desire to fix the weaknesses in the first American constitution, or the Articles of Federation, and create a stronger, more centralized government that would be able to enforce and stabilize inter-state cohesion. It took quite some time for the members of the Federal

31 Id. at 336-337. “The core premise contained in the meaning of the rule of law is that society must be governed by certain rules. In a liberal society there is a greater emphasis, both in a historical context and in practice, on the rules being imposed as duties on the State; rather than only on citizens.” Id. at 337.
32 Id. at 336-67.
33 Id. at 333. “In 1910, an Iranian diplomat and legal scholar, in his monograph entitled One Term, stated that “the fundamental basis of Western civilization is one term, and all achievements in the West result from one term: the rule of law.” Another measure of the ubiquity and centrality of the rule of law is that, while Western liberal democracy and capitalism are not necessarily universally valued, those who criticize democracy rarely contest the importance and necessity of the rule of law does not maintain a uniform definition.” Further note: “It has been said that a liberal system cannot exist without the rule of law, but the rule of law may exist in a non-liberal system” Id. at 338. “For many the rule of law and liberal democracy cannot be separated, and are considered part of the same concept, although in practice this may not have always been the case. Even in England it can be argued that for some time the rule of law existed without democracy.” Id. at 338.
Convention to craft a document, which addressed the extent of government power, state representation and citizen participation. Ultimately, the drafters of the U.S. Constitution artfully fashioned a democratic constitution that invoked a century old principle of a rule by the "people". Writing incognito, James Madison, a proponent of a centralized government, separation of powers, and checks and balances, noted that "[a] dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." In his essay, The Federalist Papers No. 51, Madison stressed that "a power independent of the society may ... espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties" therefore, "[i]t is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part".

In accordance with Madison's views, Article I, II and III of the U.S. Constitution vested legislative powers in Congress, executive powers in the President, and judicial powers in one Supreme Court so that no single branch of government can become too powerful. Additionally, the Constitution ensured that the states are protected from unlimited centralized government interference under the Tenth Amendment; as suggested by Madison, vertical separation of powers between the nation and the states, along with a horizontal separation among the federal branches would give extra security to the rights of the people.

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36 The word "democracy" is derived from the Greek word "demokratia" around the middle of the fifth century B.C. The root "demos" means people, while "kratia" means rule or authority. DEMOCRACY AND ITS CRITICS, at 3.
38 Id.
39 See generally U.S. CONST. art. I-III.
40 See supra notes 20-21.
At the horizontal level, the central, or federal government contains the legislative, executive and the judicial branches, which although separate, work harmoniously to serve as checks and balances on each other in accordance with the U.S. Constitution.\(^{41}\) Although the U.S. Constitution did not explicitly provide the Supreme Court with the power to review executive or legislative branches, Judge Learned Hand noted that the Supreme Court’s assumption of judicial review in subsequent case law was justified by the practical need to keep the government from foundering.\(^{42}\) Indeed, the doctrine of judicial review was established in 1803 by a landmark case, *Marbury v. Madison*, where the Court found Section 13 of the Judiciary Act of 1789 in violation of the United States Constitution.\(^{43}\) Judicial review enabled the courts to make public policy in relation to securing basic rights, protecting citizens from governmental abuses of power, and ensure each branch of government some authority in the process (Federalist No. 51 and No. 78).\(^{44}\) Judicial review enables courts to create and affect existing policies, impede or facilitate government actions and permit “nonelected branches of government to frustrate or replace the majority will.”\(^{45}\) One argument is that because judges are free of congressional and executive control, they are better able to evaluate whether the assertion of power against the citizens is consistent with the law.\(^{46}\) Robert A. Dahl however, makes an argument that the Supreme Court

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\(^{41}\) See *supra* note 19.

\(^{42}\) KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 26 (17th ed. 2010).

\(^{43}\) LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY 4 (2002); see *Marbury v. Madison*, 5 U.S. 137 (1803); see also BLACK’S LAW DICTIONARY (9th ed. 2009) (Judicial review is defined as “1. A court’s power to review the actions of other branches or levels of government; esp., the courts’ power to invalidate legislative and executive actions as being unconstitutional. 2. The constitutional doctrine providing for this power. 3. A court’s review of a lower court’s or an administrative body’s factual or legal findings.”).

\(^{44}\) *Id.* at 8-9

\(^{45}\) *Id.* at 5.

\(^{46}\) *Id.*
rarely challenges federal laws because of the frequency of the appointment process by Congress which tends to align with the political party of the party in power. 47

Moreover, there is criticism that judicial review may not be consistent with a democratic government when an unelected Court has the power to declare a law, which presumably reflects the will of the people, as unconstitutional and void. 48 Yet as suggested by an American constitutional law scholar, Bruce Ackerman, political life has a dualistic conception consisting of normal times, where the people form factions and pursue narrow interests; and constitutional politics, where the people express their assent through a uniquely participatory process. 49 Therefore, whether judicial review needs to be reconciled with majoritarian democracy is debatable. 50

Finally, not all democratic governments subscribe to the doctrine of judicial review. There are some democratic countries such as Canada and India that have explicitly vested their courts with the power of judicial review, while other well-established democracies, such as Great Britain, have not. 51

What is the role of the United States Supreme Court and how does it affect American citizens? It is important to note that “judicial decisions are not self-implementing” and “courts must frequently rely on lower courts or on non-judicial actors in the political system to turn law into action.” 52 There is a hierarchal judiciary system in the United States where “state supreme court decisions regarding state statutes or common law are final, except where a federal question

47 id.
48 See KATHLEEN M. SULLIVAN & GERALD GUNTHER, supra note 40, at 25.
49 id.
50 id. at 26.
51 id.
is involved, then a case can go from a state supreme court to the United States Supreme Court, which is the ultimate judicial policy maker.\textsuperscript{53} Even though all judges take an oath to support the Constitution, the Supreme Court is the final authoritative interpreter of the U.S. Constitution.\textsuperscript{54} Since judges are “obligated by their oaths to abide by the policies these higher courts insofar as they stem from constitutional interpretation”, judicial review is a powerful tool to ensure compliance, stability and enforcement of judicial decisions.\textsuperscript{55}

\textbf{B. The View from Europe}

The European Union (EU), as termed by the Maastricht Treaty on European Union (TEU) in 1992, was crafted from three separate entities: the European Coal and Steel Community, founded in 1951 by the Treaty of Paris; and, both the European Economic Community, and the European Atomic Energy Community, founded in 1957 by the Treaty of Rome.\textsuperscript{56} The chief reason to create an international European Community was to strengthen the economy.

For instance, shortly after the Second World War, France and Britain experienced significant losses in their influence and imperial holdings in the Middle East.\textsuperscript{57} The British “had no real hope of holding on to their imperial heritage” after 1945 due to the nation’s defeated economy and the colonies’ growing nationalistic movements and calls for independence.\textsuperscript{58} During the war, European colonies in North Africa and the Middle East proved to be essential in

\textsuperscript{53} \textit{Id.} at 30.
\textsuperscript{54} \textit{Id.} at 35.
\textsuperscript{55} \textit{Id.} at 35-37.
\textsuperscript{56} HELEN WALLACE, WILLIAM WALLACE & MARK A. POLLACK, POLICY-MAKING IN THE EUROPEAN UNION 4 (5th ed. 2005).
\textsuperscript{57} TONY JUDT, POST-WAR: A HISTORY OF EUROPE SINCE 1945 279 (2005).
\textsuperscript{58} \textit{Id.} at 293.
the war effort because they provided armed forces, food, oil and raw materials. The British controlled ports and territories in the Middle East and the Arabian peninsula had strategic advantages as well. Much of the region was “governed either directly from the imperial capitals, through a locally recruited governing caste of European-educated intellectuals, or else via indigenous rulers in subservient alliance with European masters”. Therefore, when the War ended, European nations had to devise a plan to recover from their diminishing colonial powers overseas, as well as improve their crushed economic conditions at home.

Therefore, pressured by their poor economies, several European nations agreed to unite their efforts and form the European Coal and Steel Community. As such, the initial stride towards European integration was a result of poor economy and not to promote justice or equality amongst its or foreign citizenry. In other words, the virtuous legal and social principles adhered to by the European Union today were not the primary goals the beginning. Humanitarian ideas began to develop fairly recently as a result of other events, conflicts and struggles experienced throughout the European continent and the rest of the world. Today, there are five agencies that comprise the European Union: The European Commission, the Council of the European Union, the European Court of Justice, the European Parliament, and the European Council.

Similar to the U.S., the EU “constitutionally guarantee[s] separation of powers between the EU and member-state levels, and a dual system of representation through the European

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59 Id. at 279.
60 Id.
61 Id.
Parliament and the Council of Ministers. The EU also has both a horizontal separation of powers with three distinct branches of government in charge of the legislative, executive and judicial functions. The Commission shares the executive role with the member states, and independent regulatory agencies (in certain areas). The Commission proposes an agenda that both the Council of Ministers and the European Parliament share in legislating. Meanwhile, the European Court of Justice (ECJ), the Court of First Instance and various national courts, which are bound directly to the ECJ through the preliminary reference procedure, share the judicial function.

The most significant leap in citizens' rights in the context of a pan-European democracy was the Treaty of Lisbon, which went into effect on December 1, 2009. Originating from the Treaty on European Union and the Treaty on the Functioning of the European Union, The Treaty of Lisbon, created new institutions, empowered agreements and principles as well as abolished and amended certain previous treaties. In addition, it introduced an extremely important element of participatory democracy, which is essentially citizen participation. In 2010 and 2011, the European Parliament and the Council, respectively, adopted the regulation on the citizens' initiative. This was a momentous step for semi-direct democracy where EU citizens obtained an opportunity to participate in European elections. Participation in elections of local and European elections is key to the concept of citizenship.

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64 Id. at 30.
65 Id. at 30-31.
66 Id. at 30.
67 Id. at 31.
1. U.S. – E.U. Comparison

To summarize, American and European notions of democracy are similar in general principles and yet they are distinct. The European Union attempted shift to a semi-direct democracy is different from the current American republican democracy in a way that makes the EU seem more “democratic”. Clearly, democracy can exist on a shifting scale, with factors such as a constitutional framework of government affecting the balance. For instance, America’s system of government divides sovereignty among three branches— legislative, executive, and judicial — while most other democratic regimes follow the British precedent, by concentrating sovereignty in the popularly elected lower house of the legislature.70 Thus, it is important to keep in mind the institutional framework that exists or should be created to accommodate a certain vision of democracy that a country seeks to attain.

In practice however, in both the U.S. and the E.U. some overlap in jurisdiction between the national and state governments exists.71 For instance, Article I, §8, cl. 3 of the U.S. Constitution gives Congress the power “To Regulate Commerce with foreign Nations, and among the Several States...” Congress has exercised significant power over States and state issues under the guise of interstate commerce. Similarly, the European Community/European Union treaties “feature broad and flexible clauses which authorize the federal legislature to regulate interstate commerce, or indeed to adopt any legislation deemed to be ‘necessary and proper’ in achieving the fundamental aims of the federation.72

From an American perspective, because modern day democracy evolved from years of political struggle, and judicial precedent, democracy is a process and a goal. It is a process

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70 Bruce Scott, The Roots of Modern Capitalism, 13 DEP’T ST. EJOURNAL 9, 10 (2008).
71 See Pollack, supra note 62.
72 Id.
because a government dependent on its people is expected to change with its people. At the same time, democracy is a goal when people use the democratic process to voice a change. Although América does not share a rich of a history as the European continent as a whole, its road to modern day democracy is similar to Europe in a sense that most of the action, sort of speak, occurred within the last century.

Although it may be questionable whether the emergence of supranational governance like the European Union and the United Nations promoted or actually hindered democracy on a national and local level, they nonetheless provide a unique perspective on democracy. For instance, the European Union’s interpretation includes: the need for a constitutional design, electoral process, legal systems and due process, human rights and freedom of expression/association, existence of political parties, transparency and government accountability. More specifically, the EU arises from the spiritual and moral heritage; the indivisible, universal values of human dignity, freedom, equality and solidarity.73

Countries that are seeking to transition into democracy should analyze the variables surrounding successful democratic nations. Although the analysis in this paper primarily focuses on the legal system and the power of judiciary review in relation to citizen participation and political equality, other factors such as market conditions, are no less important and will be addressed briefly. At this point in the discussion however, a comparative analysis should be made between the existing variables of the U.S. and the E.U. constitutional arrangements with those existent or nonexistent in Israel, Egypt and Tunisia. Central to each analysis is the question: why has government been ineffective in meeting the needs of its people post-Arab Spring?

III. MIDDLE-EASTERN COMPATIBILITY ANALYSIS

A. Israel

There is a prevailing Israeli belief, with roots from Zionism and Jewish nationalism, that drives a “system of ethical and legal justifications based on a common denominator of historical right, or the right of precedent, or, in plain language, ‘we were there first, and now we’re back’.” The term Zionism denotes Jewish nationalism and “the desire for Jews to have their own homeland.” The birth of Zionism is attributed to Theodor Herzl, a Hungarian journalist, who advocated for the Jews to return to Palestine, a place they lived until the second century A.D. This historical right, and sense of self-determination was so strong, it often times overlooked the fact that “for thirteen hundred years the inhabitants of the region had been overwhelmingly Muslim.” In fact, Arab farmers have inhabited Palestine for centuries. Although the Arabs initially welcomed the Jews, who began arriving into Palestine in the late 1800s, their hospitality did not last after it became apparent that the Jews wanted to claim all of Palestine as their homeland. Zionists believe “the Jewish nation had always existed and, in every generation, [it] had aspired to return to its country and realize its right, although to its great misfortune it had always been prevented from doing so by political circumstance.”

The need for a Jewish homeland increased in the aftermath of World War II where six

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75 MELISSA ROSSI, WHAT EVERY AMERICAN SHOULD KNOW ABOUT THE MIDDLE EAST 73 (2008) [hereinafter ROSSI]. Interestingly, not all Zionists are Jews and vice versa. “In fact, the strongest American backers of U.S. support for Israel are evangelical Protestants” and that is because they interpreted the bible to mean that Jews are to live there until Jesus returns. Id. at 74.
76 Id. at 73-74.
77 See SAND, supra note 73.
78 See ROSSI, supra note 74, at 84.
79 Id.
80 Id. at 205.
million European Jews were exterminated by Nazi Germany. However, thousands of Jews had already sought refuge in Palestine several years before the War's end. Local Palestinians were overwhelmed by the huge influx of the Jewish population and became enraged with the British for not controlling their illegal emigration. When the British failed to take any action, local Palestinians started riots and refused to pay their taxes. Likewise, relations between the Palestinian and Jewish communities worsened, and oftentimes erupted in violence. Ultimately, when the British decided to cap Jewish emigration, it caused many Jews to riot against the Brits. Incapable of resolving the situation, the British sought assistance from the United Nations. To accommodate both Palestinians and the Jews, U.N. partitioned Palestine and created two states. The bigger half of Palestine was allocated to the Jews, while the other half, consisted of “parcels of land in between” was allotted to the Palestinians. The holy city of Jerusalem was deemed an independent UN-monitored city, “owned by neither and open to both”.

1. Composition of Government and the Legal System

Israel does not have a founding document or a formally written constitution like that of the United States and many modern European nations. Instead, the law of the modern state of

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81 Id. at 91.
82 Id. at 88.
83 Id. at 88.
84 See Rossi, supra note 77, at 92. The 1947 United Nations Partition Plan incited decades of conflicts between the Arabs and the Jews. For instance, the day after Israel proclaimed its independence on May 14, 1948, armies from Egypt, Syria and Jordan launched an attack, which lasted for eleven months. Id. Consequently, two armistice lines were drawn in 1949, distinguishing two geographic areas apart from the rest of Israel that were to be controlled by Egypt and Jordan (the Gaza Strip and the West Bank, respectively). Israel & the Palestinians: Key Maps, BBC News (May 12, 2013), http://news.bbc.co.uk/hi/english/static/in_depth/world/2001/israel_and_palestinians/key_maps/stm. Yet even after the 1949 armistice, Arabs continued to refuse Israel’s ‘right to exist’ when on June 6, 1967, former Egyptian President, Gamal-Abdel Nasser, launched an unsuccessful attack on Israel known as The Six Days War. Id. at 99-100.
85 Id. 90-91.
86 Yuval Elizur & Lawrence Malkin, The War Within: Israel’s Ultra-Orthodox Threat to
Israel is a combination of the 1947 United Nations General Assembly resolution, the Declaration of Independence of 1948 and the Knesset’s Eleven Basic Laws. Until recently, the Knesset’s Basic Laws, sporadically added throughout the last half-century, were not given as much weight as ordinary laws. Although the Laws dealt with constitutional issues, enacted to serve as components for a future Israeli constitution, the Basic Laws seemed to lack constitutional supremacy. In 1995, however, the Supreme Court recognized the Basic Laws as supreme law following the Court’s landmark decision in Bank Mizrahi v. The Minister of Finance. The Court’s decision is noteworthy primarily because it established the concept of judicial review and recognized a collection of Israel’s Basic laws to be the equivalent to the State’s Constitution.


87 Id. at 74, 80 (2013); See also Jim Phipps, et. als., International Legal Development in Review: Middle Eastern Law, 40 INT’L LAW 597, 608 (2005). Foremost, the 1947 United Nations General Assembly resolution called for the termination of the British Mandate and the establishment of an Independent Arab and Jewish States. It also created a Commission, to oversee the Provisional Council of Government in each new state. Moreover, the General Assembly set out a time frame for the two states to: draft a constitution (including the General Assembly’s provisions for peace, justice, freedom of association and religion as well as many other points), hold elections, and; specifically outlined the rights and duties of withdrawing British forces. See Resolution Adopted on the Report of the Ad Hoc Committee on the Palestinian Question, United Nations General Assembly Resolution no. 81; A/RES/181 (II) (29 Nov. 1947) available at http://www.worldlii.org/other/UNGARsn/1947/81.pdt).


Final point, because the Israeli Constituent Assembly (later renamed “First Knesset”) could not decide on the provisions of their constitution, the First Knesset compromised by deciding to release “pieces” of their constitution through the enactment of Basic Laws. The First basic law was enacted in 1958, which charted the composition of the Knesset (Parliament of the State of Israel). Between the years 1958 and 2003, ten additional Laws were implemented. As of current, the Eleven Basic Laws of the State of Israel are as follows: Freedom of Occupation, The Government, Human Dignity and Liberty, The Israel Defense Forces, Israel Lands, Jerusalem, the Judiciary, the Knesset, President of the State, the State Comptroller, the State Economy. See Basic Laws of the State of Israel, ISRAEL MINISTRY OF FOREIGN AFFAIRS, available at http://www.mfa.gov.il/mfa/government/law/basic%20laws/; see also Laws of the State of Israel, ISRAEL LAW CENTER (2007), available at http://www.israellawresourcecenter.org/israellaws/israellawamendm.htm.

88 See infra, Dr. Yvonne Schmidt, at 8; There are some exceptions, however, in the case of entrenched provisions.


90 Id.
More specifically, the Chief Justice’s, Aharon Barak’s, activist approach, or “constitutional revolution” ascribed the sum of the Basic Laws as the Constitution of Israel. Thus, the Court not only “granted itself the power to strike down new legislation which contradicted any basic law... [but also] created a constitution, unbeknownst to the vast majority of Israelis and the world.”

a. The Knesset

Unlike the American system, Israel’s legislative branch, the Knesset, is a unicameral body, with its members elected every four years. Currently, the Knesset is led by a merged coalition of the Likud and Yisrael Beiteinu parties. Overall, this body consists of twelve political parties, but only includes a total of twelve Muslim individuals.

A look at the current political leanings of the Knesset will shed light into a possible resolution of the Arab-Israeli conflict. Previously distinct, the Likud and the Yisrael Beiteinu parties merged as of October 2012, evolving into one right-wing nationalist party. Following the January 2013 elections, marking it the highest voter turn out in a decade, the Likud Beiteinu party won 31 seats. Yisrael Beiteinu’s views include support for religious courts in Israel’s

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91 Prior to Bank Mizrahi v. The Minister of Finance, The Supreme Court did not consider the Basic Laws to be any more important than the ordinary laws. In fact, “new laws were held to supersede old ones, even if a new law—passed, for instance, by a 3-2 majority in plenum—contradicted a Basic Law of the State.” However, circumstances changed when in 1992 the Knesset adopted two new Basic Laws: Freedom of Occupation and Human Dignity and Freedom. Both Laws contained a limitation clause prohibiting a “violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.” This language most likely influenced the Court to hold all the Laws as supreme. However, because the Laws do not contain the complete text of the constitution, “and unknown to the public, failing in the educational, civic, and political functions” it is argued that a more comprehensive constitution could be drafted “if it grew out of an inclusive process of public deliberation”. Some deficiencies in claiming the existent Laws as the Constitution of the State include an incomplete Law on the Bill of Rights, and ignores “the issue of Israel as the state of the Jewish people”. Other critics include members of the Constitution, Law, and Justice Committee, as well as the Orthodox Knesset Members.


93 Id.

94 Telem Yahav, Final Vote Tally: Arab party loses seat to Habayit Hayehudi, YNETNEWS.COM (24 Jan. 2013),
legal system, and against the creation of a Palestinian state. As the party’s manifesto explicitly states, “[t]he end result [of a peace settlement with the Palestinians] must not be a state and a half for Palestinians and half a state for the Jews... It would be unjustifiable to create a Palestinian state that would exclude Jews while Israel became a bi-national state with an Arab minority of more than 20 percent of its citizens.”

Evidently, this strong nationalist standpoint shared by the majority of the Knesset may be problematic for any future peacemaking between the Israelis and the Palestinians. A single state solution does not seem to be a part of the current political agenda despite international support. Moreover, it is not currently feasible since it would not comport with basic notions of democracy because “[t]he emergence and persistence of a democratic government among a group of people depends in some way on their beliefs.”

b. The Judiciary

The duties and responsibilities of the Judiciary branch are described in one of Knesset’s Basic Laws. The Law describes the power vested in the courts, election of judges, and appeals. Additionally, it lists certain requirements such as citizenship, discretionary powers and scope.

http://www.ynetnews.com/articles/0,7340,L-4336830,00.html.


96 DEMOCRACY AND ITS CRITICS, at 31.


98 ALAN N. KATZ, LEGAL TRADITIONS AND SYSTEMS 234 (1986) [hereinafter KATZ]; see also supra note 95. There are many requirements for judges, one of which is that judges cannot be dual citizens of different states. Additionally, Israel’s judges have complete discretion for matters concerning national security, morality or best interests of a minor.
Finally, Israel’s legal system does not recognize juries, thereby accentuating the discretionary powers vested in the. 99

Before 1995, the Supreme Court did not review the constitutionality of the laws passed by the State’s legislative branch, though the Court was never limited in its scope and influence to do so. The Court reviews statutes in their legal applications and repeals laws that infringe on areas of national jurisdiction, administrative regulations imposed by the Knesset that conflict with fundamental rights of the people, and arbitrary or illegal acts by public officials. 100

In addition, the Court may sit as the High Court of Justice to deal with all matters outside the lower courts’ jurisdictions. It can order to “release persons who have been illegally detained or imprisoned; may issue orders to state authorities, local authorities, their officials and other bodies that fulfill public functions by law, to perform an act or refrain from performing an act, while performing their tasks in accordance with the law, and if they have been elected or appointed contrary to the law - to avoid acting; may issue orders to courts and to bodies and persons with legal or quasi-legal powers under the law (as for example the Knesset when it lifts the immunity of a Knesset member).” 101

Petitions are filed to obtain an appeal from the High Court of Justice. A High Court justice makes a determination on the claim and decides whether to proceed with deliberating on the issue. If chosen to proceed, the High Court can decide against or in favor of the petitioner. Unless the Court decides against the petitioner and dismisses the claim, the opposing party must comply with the Court’s order. 102

However, the Israeli Supreme Court has been criticized for being anti-democratic since

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99 KATZ, at 235-36.
100 Id. at 237.
102 Id.
the Supreme Court justices are chosen by a panel of non-elected panel of judges without the need of approval of possibility of impeachment from the Knesset.\textsuperscript{103}

2. Religious Implications

Israel's legal system bears influences from both the Ottoman Empire and the British Mandate.\textsuperscript{104} Under Ottoman reign, separate courts were established that distinguished civil and religious matters.\textsuperscript{105} The secular courts – Nizamiye Courts – consisted of three levels and governed civil and foreign matters having authority under the Ottoman Millet, a civil statutory code.\textsuperscript{106} Many of the Ottoman laws were later kept under British military in the beginning of the twentieth century. Although the Israeli Order-in-Council passed new laws, none defied any of the previously established Ottoman or British Mandates rules.

Albeit its attempt to Americanize its legal system, following abolition of the Mandate, Israel retained its traditional dual court system.\textsuperscript{107} Muslims, Jews and Christians enjoyed a "quasi-autonomous organization with its own judicial system" which entitled parties to seek relief in religious courts on matters regarding marriage, divorce, alimony, burial, wills, inheritance, and personal status.\textsuperscript{108} Thus, there are Rabbinical, Muslim – Shari’ah – Courts, Catholic, Protestant, and Druze Courts that maintain exclusive jurisdiction regarding matters

\textsuperscript{103} Steven Plaut, The Threat to Israeli Liberties from the Israeli Supreme Court, AMERICAN THINKER (Jul. 19, 2011), http://www.americanthinker.com/2011/07/the_threat_to_israeli_liberties_from_the_israeli_supreme_court.html.

\textsuperscript{104} Dr. Yvonne Schmidt, Foundations of Civil and Political Rights in Israel and the Occupied Territories 2 (2001) (published Ph.D. dissertation, Vienna University). The State of Israel was carved from Palestine, a region first controlled by the Ottomans from 1517 to 1917 followed by the Mandate of Great Britain from 1922 to 1947.

\textsuperscript{105} KATZ, at 223.

\textsuperscript{106} Id. at 224.

\textsuperscript{107} Id. at 225-26: Israeli government began its transition into a more unique judicial system. Although it retained many Ottoman and European structures, Israel modernized its legal system using the American model in areas such as civil rights and liberties.

\textsuperscript{108} Id.
previously mentioned. Moreover, because religious courts deem “civil marriage and divorce [as] illegal for followers of these faiths” interfaith couples face grave difficulties “to get married or divorced within the state of Israel”. In fact, Jewish law and heritage is remarkably predominant in Israel’s legal system especially regarding issues that have no statutory or judicial precedents. As such, the courts’ deference for Jewish law produces a “discriminatory effect for the non-Jewish” citizens.

Paralleling Israel, Egypt faces similar issues between its predominantly Sunni Muslim citizens and its minority Coptic Christian population. However, in Egypt, ethnic clashes may not be as detrimental to democracy as the polarized religious perspectives of its Muslim population.

B. Egypt

In the aftermath of the violent protests that spread in various cities around Egypt in January 2011, the country continues its familiar struggle with the economy, political power, and religion. Since the resignation of Hosni Mubarak, the Supreme Council of the Armed Forces assumed control of the state and issued several orders, suspending the Egyptian Constitution of 1971 and dissolving parliament. As a result of a subsequent democratic election, Mohamed Morsi was elected as President. Since Morsi’s victory, the Supreme Council and other committees drafted three constitutional declarations without much success. Presently, critics are concerned over the

109 Id. at 230; see also Dr. Yvonne Schmidt, supra note 102, at 5.
110 Id.
111 Id.
direction in which the Egyptian constitution, politics, and the judiciary will take in light of President Morsi’s new “near-absolute powers”, and his Muslim Brotherhood-led government. This, due to the Muslim Brotherhood’s dominance and influence over the political and judicial systems, Egypt’s successful democratic transition is questionable and raises the question whether the 2011 uprisings affected real change or merely replaced an autocrat.

1. Composition of the government and the Legal System

Egypt’s legal system continued to undergo changes in the nineteenth century. Tokened as the “Father of Modern Egypt”, Muhammad Ali encouraged European education, created legal councils and commissions and introduced “mixed courts” which dealt with commercial activities of foreigners in Egypt. Proceedings in the mixed courts were held in French, following the French civil code and structure. Implementation of the mixed courts led to the creation of a national judicial system, with jurisdiction over criminal, commercial and civil matters. The mixed court system came to an end in 1937, and the religious courts were soon terminated by 1956. The current judicial system is comprised of the Supreme Constitutional Court, Court of Cassation, Courts of Appeal, District Tribunals, Public Prosecution, Administrative Courts Systems (Conseil d’Etat), the State Council and the Supreme Judicial Council.

116 KATZ, at 222.
117 Id.
118 Judicial System (Egypt), in Europa World online. London, Routledge. Seton Hall University Law School. Retrieved 29 April 2013 from http://www.europaworld.com/entry/eg.dir.272. The two types of court systems in Egypt are Courts of General Jurisdiction and Administrative Courts. The highest court is the Supreme Constitutional Court which has jurisdiction over:

(i) judicial review of the constitutionality of laws and regulations; (ii) resolution of positive and negative jurisdictional conflicts and determination of the competent court between the different juridical court systems,
Since Egypt’s new constitution aims to redesign the executive, legislative and judicial branches, the future of democracy will depend on the interpretations of religious law by Islamists groups, secularist and religious leaders holding political power. However, Egypt’s Supreme Constitutional Court demonstrated that it is possible to sustain a liberal rule of law alongside Islamic religious principles. Since its creation in 1970’s, the Supreme Constitutional Court slowly evolved into an independent judicial body that was able to synthesize religious principles with liberal rule of law.

However, Shari’ah law still applies to matters involving marriage, divorce, inheritance and personal status and is “the” source of law according to a 1980 constitutional amendment. In regards to the role of the Supreme Constitutional Court and the draft constitution of October 2012, the specific position taken on issue of women’s rights for instance, is left to the interpretation of the specific ‘rulings’ of Sharia law.

e.g. Courts of General Jurisdiction and Administrative Courts, as well as other bodies exercising judicial competence; (iii) determination of disputes over the enforcement of two final but contradictory judgments rendered by two courts each belonging to a different juridical court system; (iv) rendering binding interpretation of laws or decree laws in the event of a dispute in the application of said laws or decree laws, always provided that such a dispute is of a gravity requiring conformity of interpretation under the Constitution.”


119 Id.


121 See Brown, supra note 117, at 416-17.

a. Government

Following the dissolution of Mubarak's regime, President Morsi was the first democratically elected President since Egypt gained its independence from the British in 1922.\footnote{ROSSI, at 432.} There is an important military component to Egypt, funded extensively by the U.S. for various reasons. The military has been very much involved in Egyptian government, politics, security and even infrastructure. The military supplied the nation with three autocrats beginning with Gamal Abd al-Nasser in 1952, Anwar al-Sadat in 1970, and Hosni Mubarak in 1981.\footnote{GELVIN, at 37.} Remaining in power for twenty-seven years, Mubarak ran the largest regional army, taking 97 percent of the vote at elections which does not necessarily demonstrate a lack of competition (indeed, there was a human rights activist in 2005, Ayman Nour, who won eight percent of the votes but unsurprisingly, was jailed like all others who opposed the regime), rather it is more indicative of Mubarak's unrelenting grip.\footnote{ROSSI, at 433.} The current political divide and uncertainty may have obtained its roots from the 2005 election when for the first time "a variety pack of political parties was allowed to field candidates, including the new Tomorrow Party that promoted government reform and human rights."\footnote{Id. at 437.} However, twenty-percent of parliamentary seats were taken by Muslim Brotherhood-affiliated candidates, dramatically defeating the Tomorrow Party (which only won one out of 454 seats in the National Assembly).\footnote{GELVIN, at 59; Rossi, at 437.}

Formed in 1928, the Muslim Brotherhood, a partially secret society, is a powerful international force that supports Islamic rule and that has been linked to militant groups from...
Hamas to Islamic Jihad.\textsuperscript{128} The group has been outlawed in 1954, but has slowly reemerged in the political scene around the 1970's.\textsuperscript{129} In 2005, the Muslim Brotherhood was able to gain huge political support from poor and the middle class voters because the group provided a lot of assistance with loans, housing, food, clinics and schools.\textsuperscript{130} It was still unclear whether Egyptian politics were going to lean towards an Islamic or democratic way. In 2011, the Brotherhood played a key role in the uprisings in Cairo when it joined forces with the April 6 Movement and Muhammad El-Baradei.\textsuperscript{131} Although these opposition groups shared similar goals that included overthrowing the regime, replacing the government, ending the “emergency law” which stripped citizens of all civil rights and redrafting the Constitution, there does not seem to be strong and competitive political forces to ensure and sustain a democratic rule today.

Accordingly, international aid should focus on addressing “civil society and political party development issues … and keep looking for ways to offer assistance on a whole range of areas such as constitutional reform, electoral system development, judicial strengthening, public interest advocacy, [and] human rights…”\textsuperscript{132}

There is great disparity between the small circle of the very rich and the rest of the Egyptian population. Neoliberalism played a role in widening that gap which led to the uprisings in 2011. Neoliberalism is connected to economic theories of Adam Smith and Milton Friedman, who argued for laissez-faire and market competition.\textsuperscript{133} Egyptian economy began accumulating

\begin{itemize}
  \item \textsuperscript{128} Rossi, at 439.
  \item \textsuperscript{129} Gelvin, at 59.
  \item \textsuperscript{130} Rossi, at 437.
  \item \textsuperscript{131} Gelvin, at 53.
  \item \textsuperscript{133} The Economist (13 Oct. 2012), available at http://www.economist.com/node/21564533. It is argued that Friedman’s economic theory differed from Smith’s in that he did not believe in government funding of schools or infrastructure. Smith pointed out that public works and institutions would fail under market pressure and
\end{itemize}
enormous budget deficits from the 1970’s as a result of many state funded subsidies.\textsuperscript{134} Moreover, throughout the 1980’s, the fall of petrol prices, regional wars and internal revolts throughout further contributed to Egypt’s debt.\textsuperscript{135} Finally, Egypt’s last resort for help in the International Monetary Fund in the 1990’s contributed to further economic and social disparities today.\textsuperscript{136} A great part of the Egyptian population is extremely poor, making a living on an average of $100 a month, meanwhile the “fat cats” and the “whales of the Nile” own jet planes and splurge on luxurious goods.\textsuperscript{137} Even though the government subsidized food prices, it did not deal with a tremendous housing problem “of thousands so poor they live in tombs…”\textsuperscript{138} Yet the same problems remain even after the toppling of the old regime, run by Hosni Mubarak and his son, Gamal Mubarak, “predominant crony capitalist arrangements ensure that entrepreneurs close to the former rules continue to own major assets and play an influential role in the economies.”\textsuperscript{139}

\textbf{b. The Judiciary}

Egypt’s judicial system has influences from the Ottomans, the French and other European nations. Since its independence, it was considered to have been more developed than any other country in the Middle East at the time.\textsuperscript{140} Beginning with the Ottomans, it had a centralized

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{134} M.W. Daly, \textit{The Cambridge History of Egypt: Vol. 2: Modern Egypt, From 1517 to the End of the Twentieth Century} 373 (1998).
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{Id. at 376: International Monetary Fund’s conditions for lending money resulted in large privatization of public works. The few who profited from this ‘deregulation’ became very wealthy and made ‘acute inequality ever more visible.’} \textit{Id.}
\item \textsuperscript{137} Gelin, at 35.
\item \textsuperscript{138} Rossi, at 433.
\item \textsuperscript{139} Eberhard Kienle, \textit{The Arab Regimes after the fall of Ben Ali and Mubarak: Challenge but not yet Defeated, Democratic Change in the Arab Region Discussion Seminar in Brussels (2-3 Apr. 2011), 15.}
\item \textsuperscript{140} Alan N. Katz, \textit{Legal Traditions and Systems} 222 (1986).
\end{enumerate}
\end{footnotesize}
judicial system, akin to the federal court system of the U.S. where Egypt was divided into twenty-four “circuits” with one or more judicial districts each, which was then further subdivided into smaller sub-districts, also with a court in each. 141 As previously noted, the current judicial system is comprised of the Supreme Constitutional Court, Court of Cassation, Courts of Appeal, District Tribunals, Public Prosecution, Administrative Courts Systems (Conseil d’Etat), the State Council and the Supreme Judicial Council The Court system. 142

Unlike the American judicial system, Egyptian court decisions do not follow stare decisis but instead follow a system of written statutory law. However, Egypt attempted to ensure judicial independence through its Constitution and judicial review of the Supreme Constitutional Court (SCC), which can alone nullify laws and regulations passed by the legislature. 143 It appears therefore, that the Egyptian legal system contains an element of independence necessary for a democracy to be sustained. The trouble has been, however, with Egypt’s corrupt leadership and militarist predominance, which prevents the branches of government and the judiciary to function independently as they should in a democracy. 144

2. Religious Implications

Egypt implemented justiciable Shari’ah Clauses when it amended its constitution in 1971. Yet, the Supreme Constitutional Court recognized to enforce these provisions in 1985 and

141 Id. at 220.
142 Dr. Mohamed S. E. Abdel Wahab, An Overview of the Egyptian Legal System and Legal Research, HAUER GLOBAL LAW SCHOOL PROGRAM (last visited Apr. 20, 2013), http://www.nyulawglobal.org/Globalex/Egypt1.htm. The Court of Cassation was created in 1931 and it stands as the highest court of general jurisdiction, providing interpretation and application of the law. Further, there are seven Courts of Appeal that review questions of fact and law.
143 See KATZ, supra notes 135-36, at 235.
144 Id.
RECONCILING RELIGION WITH CONSTITUTIONAL DEMOCRACY: ISRAEL, EGYPT & TUNISIA

retroactively repealed laws that were enforced after 1981.\textsuperscript{145} However, since there is no consensus even among Muslims on the sole interpretation of Shari’ah, the interpretation will depend on the particular group.\textsuperscript{146} For instance, the current struggle is between secularists, religious leaders of al-Azhar, and Islamists who are debating over the best words to use (such as ‘rulings’ or ‘principles’ of Shari’ah) in the provisions of the new constitution since these words will enable the courts and legislature to apply Islamic law from either a narrow or broad understanding.\textsuperscript{147}

The debate over the practicality and applicability of Shari’ah is crucial to the outcome of Egypt’s democracy. Shari’ah focuses on substantive justice, while leaving the procedural aspect for the State authority to decide in accordance with the best interests of society.\textsuperscript{148} Although as a normative law, Shari’ah governs all actions of men, public and private, social and individual, Shari’ah judges look to state officials to fill in the gaps.\textsuperscript{149} Therefore, Egyptian Courts attempt to combine classical scriptural rules and modern theories. A scriptural interpretation is “the classical Islamic theory of siyasa shar’iyya”, which accepts an Islamic state as legitimate if “(1) it did not require Muslims to violate an unambiguous command in a scripture that was generally understood to be authentic and (2) it served the public interest in a way that God tended to

\textsuperscript{145} Clark B. Lombardi, The Challenges and Opportunities of Islamic Review: Lessons for Afghanistan from the Experiences of other Muslim Countries, US INSTITUTE FOR PEACE (Sept. 20-21, 2011), at 10 & 19 n.6. Justiciable Shari’ah Clauses are based on the Islamic Review Clause that requires the State to respect “The Principles of the Islamic Shari’a [mabadi al-Shari’a al-Islamiyya].” Courts rejected to apply Hanafi interpretations of the Constitution’s Shari’ah Clause. Id. at 10 & 22 n.28. Hanafi interpretations are interpretations of Shari’ah Hanafi school scholars. Id. at 18 n.3.

\textsuperscript{146} See Lombardi, supra note 140, at 18 n.28 (suggesting that “the choice of an interpretation of the version of Islamic law that governs the state should simply be the interpretation that has the broadest support—as determined by the normal operation of the political process”).


\textsuperscript{148} Mashood A. Baderin, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 98 (2003).

\textsuperscript{149} See Katz, supra note 135, at 220-21.
favor.”\textsuperscript{150} In effect, if “the law of the state is consistent with the overall spirit of God’s law” then the “state law must be deemed consistent with Shari’ah.”\textsuperscript{151}

As demonstrated by Tunisia in the proceeding section, although the interpretation of Islamic law is heavily dependent upon the ruling party, there are ways to safeguard against complete political control even with an established extremist group.

C. Tunisia

Muhammad Bouazizi, 26 years old, sold vegetables for a living in an impoverished rural town of Sidi Bouzid, Tunisia, in order to provide for his family of eight. Bouazizi was fortunate to have work unlike the “hundreds of desperate, downtrodden young men” who “spend their days loitering in the café’s [and] lining the dusty streets” of his town.\textsuperscript{152} On December 17, 2010, a policewoman confiscated his unlicensed vegetable cart, and issued him a hefty fine, in addition to humiliating Bouazizi. When Bouazizi’s plea for help at the local government failed, he set himself on fire. Bouazizi’s humiliation and self-immolation ignited the rest of Tunisia and the Arab world, and his death put an end to Tunisian President’s, Zine el Abidine Ben Ali’s, 23-year long dictatorship.

1. Composition of Government and the Legal System

Tunisia gained its independence in 1959 after Habib Bourguiba overthrew the French monarch and proclaimed Tunisia a republic.\textsuperscript{153} At that time, the nation adopted a Constitution,

\textsuperscript{150} See supra notes 140-41, at 11 & 22 n.29.
\textsuperscript{151} Id.
\textsuperscript{153} GELVIN, at 37.
modeled on the French system, which allocated power among the executive, legislative, judicial and consultative committees.\textsuperscript{154} Tunisia continued to be under Bourguiba's rule until Zine el Abidine Ben Ali took office in 1987, and maintained an autocratic rule until he fled the country in 2011.\textsuperscript{155}

The 1959 Constitution vested executing power to the President of the Republic, with assistance from the Government and the Prime Minister.\textsuperscript{156} The legislative duties are vested in the Parliament, a central representative organ of the people, and it consists of the Chamber of Deputies, and the Chamber of Advisors.\textsuperscript{157} The judiciary arrangement is similar to one in the U.S. where the hierarchy of the judiciary structure ascends from the District Courts, to the Supreme Court with the Courts of First Instance and the Courts of Appeal functioning as intermediate appellate courts.\textsuperscript{158} Notably, the Tunisia has had a unified judiciary structure since 1956 when the Shari'a courts were abolished.\textsuperscript{159} Moreover, the Superior Judicial Council, composed of senior jurors, serves as the administrative authority of the judiciary, and also as serves as the guarantees for the judges by overseeing their nominations, appraisals and sanctions.\textsuperscript{160} Finally, the judges are independent, abiding by the Basic Law.\textsuperscript{161}

\textsuperscript{155} See supra note 148, at 37-38.
\textsuperscript{156} See supra note 149.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
a. Government & the Judiciary

Since Tunisia won its independence from France in 1956, it has been under two authoritarian regimes, a secular nationalist Habib Bourguiba and Ben Ali, both of which prevented political liberalization through restrictions on human rights, political participation and freedom of expression.162 For the first time in October 23, 2011, Tunisians were able to choose the National Constituent Assembly (NCA) whose focus would be on drafting a new constitution, performing quasi-legislative functions, and preparing for future elections.163 The freely elected coalition government, with Ennahda—a moderate Islamic party—in the lead with 89 seats, is currently in the process of drafting a constitution.164

Although the government successfully: dissolved and outlawed the former ruling party (Constitutional Democratic Rally), dismissed a number of officials close to the regime, lifted censorship, seized assets of more than 100 members of the prominent and corrupt Ben Ali-Trabelsi clan, and established commissions to propose political reforms and to investigate corruption—social instability remains a threat. Id. at 63. Social unrests in 2012 questioned the government’s ability to create a pluralistic, religious-neutral constitution while the economy meanwhile high unemployment rates continued to negatively impact Tunisia’s prevalent young population.165

As recognized by both the United States and Europe, peace and prosperity is the product of establishing and sustaining economic and political freedoms. Using itself as an example, U.S. has continuously advocated for democratic ideas and free markets when promoting a liberal

162 Alexis Arieff, Cong. Research Serv., RS21666, Political Transition in Tunisia 3 (2012).
163 Id. at 2.
164 Id.
world order and global market stability.\textsuperscript{166} Simply attaining a seemingly democratic government may not necessarily be sufficient enough to achieve a free market and economic growth. Evidently, free election was not enough to fix Tunisia’s poor economy and an 18.8% unemployment rate.\textsuperscript{167}

Concerns regarding the creation of a viable constitution and relief from current economic strife, point to an apparent interdependence that exists between politics and economy. Demonstrations stemmed from the people’s dissatisfaction with the government’s leading party’s actions or lack thereof in terms of improving the nation’s poor economic conditions. People’s “[f]rustration at the government’s failure to address poverty and rising unemployment” has increased resulting in “repeated protests, [with] some of them deadly.”\textsuperscript{168} For instance, when a 27-year old impoverished cigarette vendor, Adel Khadri, set himself on fire, caused other street vendors to flood the streets and express their dissatisfaction with the government.\textsuperscript{169}

Yet, the biggest demonstration since 2011 was caused by the people’s specific dissatisfaction with the majority Islamist party -- Ennahda --- where the people denounced the Islamist government for killing Shokri Belaid, a leading secular politician, over a month earlier.\textsuperscript{170}

\textsuperscript{166} William A. Reinsch, Democracy, Free Enterprise, and Confidence, 13 DEP’T ST. EJOURNAL USA 17, 18-19 (June 2008).
\textsuperscript{170} Tunisians Mark Politician’s Assassination, AL-JAZEERA (MAR. 17, 2013), http://www.aljazeera.com/news/africa/2013/03/2013316181919493512.html. Shokri Belaid, was the Popular Front’s leading member and advocate who has been threatened multiple times before. Balid “had often accused Rachid Ghannouchi’s Ennahda party, which leads the Islamist-style government, of inciting violence.” The murder of Shokri Belaid is a sign that Tunisia’s ‘Jasmine Revolution’ is turning dark, THE INDEPENDENT, http://www.independent.co.uk/voices/comment/the-murder-of-shokri-belaid-is-a-sign-that-tunisias-jasmine-
As recognized by both the United States and Europe, peace and prosperity is the product of establishing and sustaining economic and political freedoms. The U.S. has continuously advocated for democratic ideas and free markets when promoting a liberal world order and global market stability.\textsuperscript{171} Simply attaining a seemingly democratic government may not necessarily be sufficient enough to achieve a free market and economic growth. Evidently, free election was not enough to fix Tunisia’s poor economy and an 18.8\% unemployment rate.\textsuperscript{172}

2. Religion and Economy

A study measured the extent of popular support for Shari’ah law in relation to the political power held by religious leaders across the Arab world demonstrated that a long-lasting democratic institution is more likely to emerge in Tunisia than in Egypt where popular support for Shari’ah was lower.\textsuperscript{173} Although the study indicated that the region’s historical institutional support for Islamist groups threatens democracy because of the likelihood that Islamist groups establishment of autocratic rule in the absence of checks on their power, the results also showed that Arab culture, religion or the Arab-Israeli conflict may not be an obstacle to achieving democracy as much as the legacy of the region’s historical institutional framework.\textsuperscript{174} In order to balance even an Islamist majority group, citizens should work on developing a check on the power of these groups through labor unions, or commercial interests.\textsuperscript{175}

\textsuperscript{171} See supra note 161, at 18-19.
\textsuperscript{173} Eric Chaney, George A. Akerlof & Lisa Blaydes, Democratic Change in the Arab World, Past and Present, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY 363 (1970-2010).
\textsuperscript{174} Id.
\textsuperscript{175} Id.
What if, for argument’s sake, neoliberalism could provide the missing link? If democracy strengthens free markets when it is accompanied by strong local institutions and social trust, then “[t]he key to encouraging the growth of democracy and economic freedom is to foster the local institutions on which both are based.”\textsuperscript{176} Neoliberalism is reminiscent of laissez-faire economics in supporting free markets, and individual autonomy while at the same time, stressing the importance of environment. Individuals and trade can be only truly be free and independent where there are safeguards in place that can protect their rights and freedoms.\textsuperscript{177}

For instance, U.S. and Community for Democracies, pledged to award $20,000,000 to build Tunisia’s social sector. With the Middle East Partnership Initiative, assistance will go towards: establishing an independent and professional media sector, strengthening civil society, supporting the development of political parties, developing a sound electoral framework, and encouraging economic reforms to expand the private sector.\textsuperscript{178} Therefore, it is absolutely crucial for the U.S. and other international organizations to not only promote the requisite democratic principles and continue supplying Tunisia with financial aid, but also enlighten the local government of the concept of neoliberalism. In any democracy, people’s trust will determine a party’s political fate. Thus, even for an Islamist government, continued political support can be feasible if the government begins to pay special attention to citizens’ autonomy, demands, participation in civil groups, unions and other local institutions, especially when drafting a new constitution or economic agenda.

\textsuperscript{176} See supra note 166, at 19.
\textsuperscript{177} GELVIN, at 30.
CONCLUSION: A LONG ROAD TO COMMITMENT

Democracy can be achieved with the implementation of a strong institutional framework that protects political parties, unencumbered citizen participation, civil liberties and freedom of expression. Elimination of corruption, fear of punishment or imprisonment and government accountability are also necessary. At the same time, economic stability and a level of equality in terms of economic opportunities and conditions for the population must be in place to achieve and sustain a democratic government.

In the Middle East however, religion continues to play a significant role in the political and legal systems, which is distinguishable from the American and the European democratic systems. Currently, in both Egypt and Tunisia, the driving force behind continued political strife has been their dwindling economy, poor living conditions and high unemployment rates. Egypt has only two political forces, the Muslim Brothers and the remnants of the National Democratic Party, upon which people are relying to improve their situations. Seeing how economy and politics are intertwined, the balance of power remains uncertain, even two years following the uprisings in Cairo, showing a prominent support for a religious, Islamic group, the Muslim Brotherhood, on grounds that it has made improving economic and social concerns its priority. It may be very possible that such a group could best serve the interests of the population as a whole if President Morsi’s government does not take a more active role in improving Egypt’s socio-economic conditions. Moreover, keeping religious differences in mind, it should be noted that approximately 98 percent and 90 percent of the population in Tunisia and Egypt, respectively, are Sunni Arab.\textsuperscript{179} Therefore, it is not surprising that along with the revolution came

\textsuperscript{179} \textsc{Gelvin, at 35.}
sectarian violence, “pitting Muslims against Coptic Christians...”180 Consequently, the pressure should be placed on the government to ensure its minority population groups more protection. One of the ways the government could do this is by ensuring citizens’ participation.

Furthermore, Israel is also heavily predisposed to Jewish religion and traditions. Unlike Tunisia and Egypt, which have at least made serious attempts to draft secular constitutions, Israel, to this day, does not have a constitution, which is due to an existing divide “between those who want a state for Jews and those who want a Jewish state.” 181 It is argued that Israel has no need for a constitution because it has a religious law, that unlike the Shari’ah, evolved as the life of the Jewish people changed.182 This has not been a defining feature of the Muslim societies but as the political make-up of the revolutionary Middle Eastern states is shifting, there have been an emergence of political groups in Israel that are more or less leaning towards a stricter interpretation of religious law, “its relation to civil law, and even among Muslim as well as Jewish fundamentalists, [question] whether civil law should exist at all.”183

If democracy’s survival is dependent upon a strong economy, and separation of powers where there are transparent and independent judicial, legislative and executive branches, how can Egypt, Tunisia and Israel create such an atmosphere when it interposes a strong emphasis of religious law? The reason why America has achieved democratic success, is because historically, it has been established on principles of religious tolerance. The Puritans sought refuge in the New World primarily as a result of Old World religious prosecution. Thus, the most rudimentary component of democracy is shared beliefs. Understanding that a large group

180 Id. at 65.
181 See supra note 85, at 74.
182 Id. at 74-75.
183 Id. at 76.
of people cannot share the same wants, however, James Madison pointed out that a competition between opposing beliefs is also essential to ensuring that both minority and majority groups are heard and represented in a democratic government.

Therefore, strong institutional safeguards must protect political competition. How willing are the Sunni Arab majority of Egypt and Tunisia to accept the fact that approximately ten to one percent of their non-Muslim population does not share in the same religious beliefs but is nonetheless equal in terms of economic and other civil liberties? If the Muslim Brotherhood succeeds in gaining control, or if Israel remains undivided and only compromises on exchanging certain territories, there is not much hope for an all-inclusive/tolerant religious future without a strong competitive political force to keep the balance of power in check. Finally, as religious law and courts add an almost separate dimension, invoking humanitarian rights or acknowledging acceptance of all religious in the newly drafted constitutions, in practical terms, provides less assurances to the religious minority groups than it does to international observers.

If democratic change must grow from within, perhaps a European model of democracy would be the most suitable alternative for the countries. American and European systems are able to function as democratic entities even with ethnically, religiously, and politically diverse populations. Similar to both is citizen participation in political decisions, strong institutional frameworks that ensure and enable participation, and a healthy economy. Although religion adds an important dimension, religious law can co-exist with democracy as long as there are protections set in place against an over-zealous religious group or government. Otherwise, it is unlikely that these Middle Eastern countries can reach a truly sustainable democracy.

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